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In the

Supreme Court of the United States

October Term, 1998

DENNIS GEORGE,

Petitioner,

-v-

MARK ABBOTT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. IN REVIEWING A POLICE OFFICER'S CLAIM OF QUALIFIED IMMUNITY IN AN ACTION UNDER 42 U.S.C. § 1983, HOW DOES A COURT KNOW WHETHER THE CONTOURS OF A PLAINTIFF'S RIGHTS ARE SUFFICIENTLY CLEAR AND WHETHER A POLICE OFFICER'S CONDUCT IS OBJECTIVELY REASONABLE AS A MATTER OF LAW?

II. HAS A POLICE OFFICER, WHO RELIES UPON A VALID CERTIFICATE OF TITLE IN RESPONDING TO A DISPUTE OVER POSSESSION OF A MOTOR VEHICLE BETWEEN EX-SPOUSES, AFFORDED PROCEDURAL DUE PROCESS TO THE PARTIES OR, IN THE WORDS OF THE THIRD CIRCUIT, CONDUCTED A "CURBSIDE COURTROOM"?

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The opinion of the United States Court of Appeals for the Third Circuit is set forth in the Appendix, p. 1a and is reported at 164 3d 141 (3d Cir 1998). The opinion of the United States District Court for the Western District of Pennsylvania is set forth in the Appendix, p. 19a and is unreported.

JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254. The United States Court of Appeals for the Third Circuit issued its Opinion in this case on December 11, 1998. This Petition was timely filed within 90 days of the issuance of the Third Circuit Court of Appeals opinion.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254, p. 31a
28 U.S.C. § 1291, p. 31a
28 U.S.C. § 1331, p. 31a
28 U.S.C. § 1343(a), p. 33a
42 U.S.C. § 1983, p. 33a
75 Pa.C.S.A. § 1106(c), p. 33a
75 Pa.C.S.A. § 1111(a), p. 35a
75 Pa.C.S.A. § 1301(c), p. 37a

STATEMENT OF CASE

This case arises out of an action under 42 U.S.C. § 1983. George and other law enforcement defendants filed Motions for Summary Judgment based on several theories. The District Court granted Summary Judgment as to all

Officer-Defendants on grounds of qualified immunity. Abbott appealed from the Order of the District Court entering Judgment in favor of Latshaw, Diehl and the Officers.

Upon appeal the Third Circuit affirmed summary judgment in favor of Stafford and Sarsfield, but reversed as to George, Diehl and Latshaw. The District Court had subject matter jurisdiction pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1331 and 28 U.S.C. § 1343 (a)(1). The Third Circuit's subject matter jurisdiction was derived from 28 U.S.C. § 1291.

In 1989 while in bankruptcy Mark Abbott (hereinafter "Abbott") and his then-wife Laurie Latshaw (hereinafter "Latshaw") purchased a Plymouth Grand Voyager (hereinafter "car") and arranged for it to be titled in the name of Dale Feather (hereinafter "Feather"). At the time, Feather was Abbott's father-in-law. Abbott made these arrangements in order to conceal the transaction from the Bankruptcy Court, the Bankruptcy Trustee and his creditors. Third Circuit Appendix (hereinafter TCA), p.413.

In 1993 Abbott and Latshaw were divorced. During the course of their Divorce proceedings Latshaw had obtained a Protection from Abuse Order against Abbott. Outside the scope of the divorce proceedings, Abbott had an attorney draft a "Bill of Sale" for the car which Feather executed. Abbott retained possession of the car. Feather was to retain title to the car until Abbott completed all of the payments. Abbott made all of the payments but Feather never conveyed the title to Abbott and Abbott took no action to compel Feather to make the assignment of title.

On April 23, 1996, Feather executed an assignment of title to the car to Latshaw. TCA, p.84. Latshaw obtained a temporary registration plate for the car issued by the Pennsylvania Department of Transportation through a notary public. TCA, p.83.

Prior to the incident involved in this action Latshaw called Diehl to request his assistance. Latshaw testified that she told Diehl that she wanted his assistance out of concern to avoid "any violence" and to leave "without any problem". On the morning of April 25, Latshaw travelled from her home in Ohio to attend a child support hearing in Greensburg on the matter of Abbott's arrears in payment of child support for both Latshaw's children and Abbott's child by a third woman. TCA, p.412.

After the child support hearing, at about 5:00 p.m. on April 25, 1996, Latshaw went to Abbott's office for the purpose of taking the car. By prior arrangement she met Diehl and a locksmith she had hired on Diehl's recommendation. Diehl entered Abbott's office, identified himself as a constable and told Abbott that Latshaw had arrived to take the car and he asked Abbott to turn over the keys. Abbott refused and called his lawyer, David Harr, who spoke to Diehl telling him that he had drafted a "Bill of Sale" for Abbott. Diehl then left the office.

Diehl called the Greensburg Police Department. George and two other officers were dispatched for a "police assist." TCA, p.471, line 21; p.500. George, holding the rank of lieutenant was the officer responsible for supervising the shift. Id.

George inspected the assignment of Certificate of Title, car registration, temporary license plate and insurance certificate and confirmed that Feather had assigned the Certificate of Title to Latshaw. TCA, p.475. She had executed a change in the car's registration and had obtained insurance for the car. He noted that the forms had been notarized. TCA, p.479.

Abbott told George that he had a "paper" or "Bill of Sale" that established his right to ownership. Id. Abbott admits that George did "nothing" which prevented him from obtaining this "paper". TCA, p.381. In fact, prior to the George's arrival at the scene Abbott spoke by telephone with his wife, Sherry Abbott, but testified that he did not think to tell her to get the "paper" and bring it to the office. Mrs. Abbott arrived at the scene before George by her own personal car. TCA, pp.309-310 and pp.318-319. Neither Abbott nor his wife attempted to use Mrs. Abbott's car to return to their home and retrieve the "Bill of Sale."

Abbott also testified that he was told by Diehl that if Abbott were to drive the car Latshaw could have Abbott arrested for taking her car. TCA, p.381. In the meantime, Abbott's second lawyer, David Millstein, arrived at Abbott's office. Millstein argued with George. The locksmith completed his work and Latshaw got into the car preparing to drive away. Millstein got into his Jeep and attempted to block Latshaw's path. Millstein got out of the Jeep and his argument with George resumed.

George told Millstein to move his Jeep. Millstein refused and George directed another officer to cite Millstein for disorderly conduct. Millstein was arrested, cited and released at the scene. Latshaw was able to drive around

Millstein's Jeep and returned to Ohio. Her teenage daughter drove Latshaw's car.

Millstein was found guilty of disorderly conduct before a magistrate. He appealed and the Court of Common Pleas remanded the case to another magistrate who decided the case solely upon the transcript of the first hearing. Millstein was again found guilty. He appealed again and the Court of Common Pleas acquitted him.

REASONS FOR GRANTING WRIT

I. IN REVIEWING A CLAIM OF QUALIFIED IMMUNITY IN AN ACTION UNDER 42 U.S.C. § 1983, A COURT SHOULD EXAMINE THE CONTOURS OF A PLAINTIFF'S RIGHTS AND THE POLICE OFFICER'S CONDUCT IN THE CONTEXT OF THE SPECIFIC FACTS OF THE CASE. IF A STATE ADMINISTRATIVE PROCEDURE PROVIDES PRIMA FACIE EVIDENCE OF ONE CLAIMANT'S RIGHT TO POSSESSION OF PROPERTY, THEN RELIANCE ON SUCH STATE PROCEDURE IS OBJECTIVELY REASONABLE AS A MATTER OF LAW.

Over the last 70 years Pennsylvania appellate courts and federal courts deciding a variety of civil actions involving property rights in motor vehicles have determined the legal meaning and value of a Certificate of Title to a motor vehicle. By April 25, 1996 that meaning, value and understanding had been unequivocally stated and the rule recognized that although a Certificate of Title is not conclusive evidence of

ownership, it is prima facie proof of a right to present possession. *Braham & Co. v. Steinard-Hannon M. Co.*, 97 Pa.Super. 19 (1929); *Speck Cadillac-Olds v. Goodman*, 373 Pa. 83, 95 A.2d 191 (1953); *S.E. First National Bank of Miami v. Security Peoples Trust Co.*, 480 F.Supp. 1345, 1347 (W.D.PA. 1979); and *In re Estate of Summers*, 424 Pa. 195, 226 A.2d 197, 199 (1967).

The law made by the courts interprets an administrative procedure established by the Pennsylvania legislature as a means of facilitating commercial transactions involving motor vehicles and in protecting motor vehicles from theft. *Taplinger v. Northwestern National Bank*, 101 F.2d 274 (1938). The keystone of this process is the issuance of a "Certificate of Title" which is "...prima facie evidence of the facts appearing on the Certificate." 75 Pa.C.S.A. § 1106(c).

The "owner" of a motor vehicle is defined by statute as one who has the property right in or title to a vehicle and includes one "...who is entitled to use and possess the vehicle subject to a security interest held by another person...." 75 Pa.C.S.A. § 102. Transfer of ownership of a car is evidenced by an assignment of the title as required by state law. 75 Pa.C.S.A. § 1111(a). The actual document itself is endorsed by Pennsylvania's Secretary of Transportation.[1]

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[1] "I certify that reasonable diligence has been used in examining the statements presented in the application for Certificate of Title to the vehicle described hereon and that the proof of ownership of said vehicle with said application warrants the issuance of this Certificate naming the applicant as lawful owner of said vehicle. Wherefore, I certify that as of the date inscribed herein, the official records of the Pennsylvania Department of Transportation reflects that said applicant is the lawful owner of said vehicle. [signed] Howard Yerusalim, Secretary of Transportation." (Emphasis added.)

Also, the legislature provided for "registration" of the vehicle, including the issuance of a temporary registration document by a notary public. The temporary registration indicates that the Certificate of Title has been applied for or issued. 75 Pa.C.S.A. § 1301(c). The owner of a motor vehicle registered in Pennsylvania is compelled to obtain insurance coverage for the car and carry a certificate issued by an insurance carrier as proof that the car is insured. 75 Pa.C.S.A. § 1782.

The Pennsylvania Department of Transportation administers this process. 75 Pa.C.S.A. § 6102. The administration of this process includes the production of forms, review of applications, conduct of investigations, retention of records and the furnishing of documents and information to the public and law enforcement officers. 75 Pa.C.S.A. § 6104. As noted above, the purpose of this process is to facilitate commercial transactions involving motor vehicles and protect motor vehicles from theft, but more broadly stated the purpose of this administrative process is to provide notice of a lawful property interest and thus protect private property from trespass.

This case juxtaposes a state law specifically designed to put all people on notice of the existence of a lawful claim to possession of a car with the 14th Amendment of the United States Constitution which prohibits the deprivation of property without notice and an opportunity to be heard. George contends that, in the context of a police officer summoned to prevent a breach of peace and arrest of one or both private citizens who were arguing over a car, the requirements of the 14th Amendment are not sufficiently clear compared to the unequivocal, affirmative declarations of property rights evidenced by official state documents.

The Third Circuit reversed summary judgment in favor of George concluding that, despite the established state law concerning Certificates of Title, a reasonable police officer would have known that Abbott was entitled to a court hearing prior to deprivation of his possessory interest in the car. The court determined that a fact-finder could conclude that certain of George's actions (i.e., telling Latshaw that the Title gave her a right to possession, Appendix, p. 10a, and citing and arresting Abbott's lawyer for disorderly conduct, Appendix, p. 15a) crossed the line of neutrality and effectively denied Abbott procedural due process. Therefore, George was not entitled to qualified immunity.

George is immune from liability if his conduct did not violate Abbott's clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Whether a right was clearly established involves consideration of whether "...[t]he contours of the right...[are] sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The actions of George need not previously have been held to be unlawful but in "...the light of pre-existing law the unlawfulness must be apparent." *Id.*

The analysis followed by the District Court in granting summary judgment in favor of George examined the specifics of George's conduct and the precise rights of due process held by Abbott in the context of the property dispute which occurred in the late afternoon of April 25, 1996. As noted by the District Court, the analysis of qualified immunity does not turn upon the generalities associated with a broad constitutional provision. *Id.* at 639.

In contrast, the Third Circuit relied upon the general principle set forth in *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). *Fuentes* involved the constitutionality of a replevin statute and held that a person is entitled to notice and an opportunity to be heard. *Id.* 407 U.S. at 545. In defining the phrase "an opportunity to be heard" this Court referred to *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965) which required that the opportunity to be heard must occur at a meaningful time and in a meaningful manner.

If, as the Third Circuit has done, one analyzes the circumstances in which George found himself on April 25, 1996 solely in the context of the broad constitutional mandate that no property shall be deprived without prior notice and hearing, then George's conduct appears unreasonable. However, procedural due process is not a technical concept and the exact parameters of the Due Process Clause change depending upon the situation. When George's conduct is considered in the context of his reliance upon existing state law concerning ownership of motor vehicles his actions are objectively reasonable.

There is no dispute that Latshaw had made up her mind to take possession of the car, not only before George arrived on the scene but even before she departed from Ohio. Thus, if George's conduct can be found to have had any effect on the outcome of events of April 25, 1996, it is only as to whether Latshaw would prevail and not whether she would attempt to take possession of the car. Neither is there any dispute that George's decisions and the actions flowing from those decisions were made in reliance upon the Title and related documents.

Abbott and the Third Circuit disregard the documentary proof of lawful ownership presented to George. Appendix, p. 14a. Latshaw presented to George and the other officers a Pennsylvania Certificate of Title issued in the name of Dale Feather and on the reverse side there was a notarized assignment of title to Latshaw; an executed temporary registration; a temporary license plate; and an insurance card indicating the car was insured under a policy issued to James P. Latshaw. The assignment of title to Latshaw had been notarized by an Illinois notary public and the temporary registration was signed by a certified agent of the Commonwealth of Pennsylvania. All of the paperwork was in order. George's subordinate, Officer Robert Stafford, confirmed the registration of the car by radio communication with his dispatcher who had access to the records of the Pennsylvania Department of Transportation.

Latshaw also presented a vehicle registration and temporary license plate which were authentic and valid and provided further evidence to George and the other officers that Latshaw was the owner of the vehicle. She also possessed a certificate showing that she had insured the car.

In contrast, Abbott only made undocumented assertions that he was the lawful owner of the car. He made no attempt to obtain the "Bill of Sale" which allegedly entitled him to possession of the car. Neither George nor the other officers did anything to prevent Abbott from returning home to retrieve his copy of the Bill of Sale. (Abbott's wife had arrived with their second car.) Abbott did not produce the current vehicle registration which had been issued to Dale Feather and which Abbott later testified he had paid for and kept in his possession. Abbott did not ask his wife to retrieve the Bill of Sale. Abbott did not produce his own proof of

insurance for the car, a prerequisite to lawful operation of the car on the highways of Pennsylvania.

In sum, George was presented with two types of information. The first type was objective, documentary, sanctioned by law, attested to under oath, supplied by an impartial administrative process, complete and consistent with the usual manner for the transfer of ownership of cars. The second type was subject, verbal, unsworn, atypical for motor vehicle transactions and the source was Abbott and his attorneys who had a clear bias. George's actions relied on the former source of information. There is no claim that George's actions deviated from any standard police procedure, policy or practice for determining whether a person's possession of a car is lawful.

George's actions (his statement to Latshaw and his arrest of Abbott's attorney) were objectively reasonable as a matter of law. His conduct was not arbitrary, but rational. In any event, the apparent tension between state law and the general principle of *Fuentes* permits a reasonable difference of opinion among objective minds.

That reasonable minds may differ as to whether the contours of Abbott's procedural due process rights were sufficiently clear is demonstrated by the fact that in this case learned judges have reviewed the same facts and have arrived at contrary conclusions. The District Court concluded that, as a matter of law, reliance upon Latshaw's documentation was not objectively unreasonable "...with regard to who was entitled to immediate possession of the van and the right to operate it on the highways of the Commonwealth." Appendix, 27a.

With equal conviction the Third Circuit wrote, "...the district court and the parties have overstated the importance of Latshaw's documentation, while ignoring the established precedent of *Fuentes* as well as the overall context of the seizure" Appendix, p. 10a, and that "...[r]easonable police officers should know from the established precedent of *Fuentes* that their role is not to be participants in property deprivations without notice and an opportunity to be heard." Appendix, p. 11a. If federal judges with the benefit of hindsight, lawyers' briefs, oral argument and LEXIS can err as to the certainty of Abbott's rights, then one cannot reasonably expect more from a police officer on a sidewalk who must make a prompt decision.

This is not to say that George should prevail here simply because the District Court granted summary judgment in his favor. In contrast to the District Court's acknowledgment that Abbott had a colorable claim to a court hearing per *Fuentes*, Appendix, p. 24a, the Third Circuit expressed no rationale for its conclusion that a reasonable officer should not have been influenced by Latshaw's apparent right to use and possess the car as evidenced by her Title and other documents.

George was confronted by two competing claims for immediate possession of the car. At the end of the day, either Abbott or Latshaw would get behind the steering wheel and drive away before a judge heard testimony. Even so-called "neutral conduct" by George would have had the effect of permitting one of the parties to succeed in taking the car. Even assuming that Latshaw and Abbott could have thwarted each other, the resulting Mexican stand-off would have denied the car to the rightful possessor without a court hearing.

Implicitly all persons present understood that the loser in this tug-of-war would accuse the winner of theft. In fact, Abbott's attorney subsequently initiated a criminal investigation of the matter by the Westmoreland County District Attorney's office. Latshaw summoned a constable to the scene who, in turn, called the Greensburg police. George could have stopped Latshaw, either by affirmatively restraining her or refusing to arrest Abbott if he took the car. However, stopping Latshaw would have placed him in the position of depriving her of her clearly established right to present possession, *Braham & Co.*, *supra*, created under state law.

Under the circumstances, George elected to rely upon Latshaw's documents. His action defused a potential disturbance of the peace and pre-empted the necessity of choosing to arrest one of the parties for theft. Out of a series of actions taken by George that afternoon, the Third Circuit identified only two of George's actions as violating Abbott's rights: George's statement to Latshaw that she had a right to immediate possession of the car, Appendix, p. 10a; and his arrest and citation of Abbott's attorney for disorderly conduct. Appendix, p. 15a. As a matter of law neither of these actions offends Abbott's rights.

As discussed above, George's statements to Latshaw were a correct statement of Pennsylvania law. The arrest of Abbott's attorney is not a violation of Abbott's rights. A claim under § 1983 must assert a violation of personal rights. *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Only if one concludes that Abbott had the right to vicariously commit an act of civil disobedience in the form of a "park-in" by his attorney is the subsequent arrest a violation

of Abbott's rights. However, there is no precedent for this theory of liability.

In determining whether the contours of plaintiff's rights are sufficiently clear to charge an official with notice of those rights, a court should look to the specifics of the rights under the particular circumstances of the case before it. It is unfair to state that an objective standard of conduct requires a person to deduce from broad constitutional principles the limits of his authority under a narrow, even unique set of facts while ignoring state law that speaks directly to the situation he confronts.

II. A POLICE OFFICER, WHO RELIES UPON A VALID CERTIFICATE OF TITLE IN RESPONDING TO A DISPUTE OVER POSSESSION OF A MOTOR VEHICLE BETWEEN EX-SPOUSES, HAS AFFORDED PROCEDURAL DUE PROCESS TO THE PARTIES.

In addition to their responsibilities to enforce criminal codes, police officers are routinely called to the scene of civil matters including, for example, enforcement of emergency Protection from Abuse orders and automobile repossessions. These circumstances may require a police officer to decide whether to act or refrain from acting upon an order, writ or other governmental document which has been issued ex parte. Other state officials encounter similar situations. Beyond the specific facts of this case the issued raised here presents a test for the guidance of police officers and other government officials who, in the future, must make a decision concerning the proper course of action which may affect property or liberty interests.

Abbott and the Third Circuit maintain that *Fuentes v. Shevin, supra*, holds that the 14th Amendment requires notice and a hearing in court before deprivation of a person's property except in limited exigent circumstances or where "...alternative procedures guarantee protection against erroneous or arbitrary seizures." Appendix, p. 9a. Thus, a police officer answering a call to a civil dispute over a car must remain "neutral," doing little more than stand by and watch the activities of the private citizens unless a crime occurs in his presence or he has probable cause to believe that a felony has been committed and that the felon may abscond.

The private citizen who holds an ex parte order, writ or, in this case, a document of title issued by the Secretary of Transportation, is entirely on her own to enforce the rights which such document may grant. If this civil confrontation can provoke a criminal disturbance, then the police officer is authorized to act to quell the disturbance.

George's position is that *Fuentes* is an excellent statement of the general proposition that the 14th Amendment requires notice and an opportunity to be heard, but that *Fuentes* begs the question of precisely what process satisfies the constitutional protections guaranteed by the Due Process Clause in a particular circumstance.

More directly to the issue in this case, and omitted from the analysis of the court's opinion below, is this Court's decision in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Applying the three-part test in *Mathews*, George contends that it provides a police officer with more accurate guidance, in general, and a different result in this particular case.

The key factor in this case is the Certificate of Title. There can be no doubt that the issuance of a Certificate of Title is a "procedure" the purpose of which is to give "notice" of a claim of ownership to a motor vehicle and afford adverse claimants the opportunity to obtain a hearing in court to adjudicate their claims. The issuance of a Certificate of Title is an ex parte procedure and it is a procedure established by state law.

The legal effect of a Certificate of Title has been discussed in the argument in the first Question Presented to this Court. Certain details of the Pennsylvania's appellate opinions merit further inspection, though. In *Braham & Co., supra*, the Pennsylvania Superior Court interpreted for the first time the Act of 1923, P.L. 425, as amended by the Act of 1925, P.L. 286, which were the antecedents of the current statutes. The Superior Court wrote that the "primary purpose" of this law was:

> "...to protect the public against the theft of automobiles and their resale by the thief, and to facilitate recovery of stolen automobiles. It was a police measure, and was not designed to establish ownership or proprietorship of the car, but rather to register the name and address of the person having the present right of possession, and to furnish persons dealing with one in possession of a car a means of determining whether such was prima facie lawful.

Braham & Co. v. Steinard-Hannon M. Co., 97 Pa.Super. 20, 23 (1929)(Emphasis added.)

The Superior Court added that, as noted above, an "owner" as that term is defined by Pennsylvania's Vehicle Code, includes a person entitled to the use and possession of the car. These principles have been restated and affirmed in subsequent opinions.

None of this law was addressed by the court below inasmuch as it had already concluded that the mandate of *Fuentes* required a pre-deprivation court hearing. The Third Circuit simply offered unsupported conclusory statements that there were no exigent circumstances and the alternative procedure represented by the Certificate of Title and related documentation did not guarantee Abbott protection against erroneous or arbitrary seizures. George respectfully disagrees.

Mathews, consistent with the general rule set forth in *Fuentes*, established a three-part test to determine the adequacy of administrative procedures as a means for satisfying a person's right to procedural due process. This test was not applied by the circuit court. Rather the Third Circuit cited *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974) in which this Court upheld a Louisiana statute which required creditors seeking an ex parte property sequestration order to obtain prior judicial approval on the basis of an affidavit or verified petition and to post a bond. A debtor had the right to seek immediate dissolution of the writ or regain possession by filing a bond. Appendix, p. 9a.

Admittedly, the procedures George relies upon in this case do not require prior judicial approval or a bond. However, the procedure of applying for a Certificate of Title does require the applicant to sign and verify the application

under oath or affirmation. 75 Pa.C.S.A. § 1103.1(b). Although no bond is posted in the course of this procedure, only an owner can apply for a Certificate of Title. Thus, the person named on the Title must either be a purchaser for value, a donee of the purchaser or, as in this case, a person whose name is placed on the Title by the purchaser. This protection afforded to the lawful owner is equivalent to, or superior to the requirement of a bond. Despite the absence of prior judicial approval, the administrative process provides an impartial review of the Title holder's application.

As to post-deprivation remedies, preliminary injunctive relief is available to a person erroneously deprived of his car or he may do as Abbott did in this case and commence criminal proceedings. Even if the Third Circuit is correct in concluding that the procedures described here are not "comparable" to those endorsed by *Mitchell*, this Court has not taken the position that prior judicial approval, a bond and immediate post-deprivation procedures are necessary to satisfy the Due Process Clause.

In *Mathews* this Court provided a blueprint for analysis of alternative procedures. The adequacy of the process is determined by the private interest that will be affected by official action; the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute safeguards; and the government's interest, including the function involved and fiscal and administrative burdens that additional or substitute procedural requirements would entail. *Mathews*, 424 U.S. at 335, 96 S.Ct. at 903.

Considering these factors, the substantial importance of a possessory interest in a motor vehicle is acknowledged

by the very existence of the Certificates of Title and vehicle registration. It is the protection of the owner's right to "use and possess" a car that is the raison d'être of the process.

The risk of an erroneous deprivation of a possessory interest in a motor vehicle is minimal since it is the purchaser or his designee who applies for the Certificate of Title. In this case, Abbott himself applied for the Certificate of Title. He chose to place the title in the name of Dale Feather for the purpose of avoiding notice to creditors while he, Abbott, was under the protection of the Bankruptcy Court. But for Abbott's deceit, no impairment of his possessory interest would have been possible on April 25, 1996. To the extent that Abbott was erroneously deprived of his possessory interests, it occurred in reliance upon the Certificate of Title for which he applied.

Although neither Abbott nor the Third Circuit considered the analysis of *Mathews*, by implication they conclude that the substitute safeguard of a pre-deprivation court hearing possesses a probable value which outweighs any fiscal or administrative burdens. However, a court hearing would rarely afford the lawful possessor of a car any additional protection because in most cases the lawful possessor is also the owner named on the Title.

To require a court hearing would impose substantial additional fiscal and administrative burdens upon government, automobile owners and others. No one could claim to be a bona fide purchaser of a car because they relied upon the Certificate of Title; they would need to conduct a judgment search to discover whether a court had awarded a property interest to a person not named on the Title.

CONCLUSION

The Court should grant certiorari in this case. Government officials, including police officers, rely upon official documents to make decisions on a daily basis. Their decisions are not preceded by a court hearing yet affect liberty and property interests and are part of the ordinary function of government.

The published opinion of the Third Circuit suggests that a court hearing or other prior judicial approval is an essential pre-requisite to governmental action except in exigent circumstances. Without clarification of the requirements of the Due Process Clause, all governmental officials can now be charged with notice that a person has a clearly established right to a court hearing prior to deprivation of liberty or property, unless the government official can show that there were exigent circumstances or that the state has established a procedure that clearly meets or exceeds the standards set in *Mitchell*.

George respectfully requests this Honorable Court grant certiorari, reverse the order of the Third Circuit and grant summary judgment in his favor.

Respectfully submitted,
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(Footnotes trail end of each document)

MARK ABBOTT, Appellant v. LAURIE J. LATSHAW, ALBERT DIEHL, DENNIS GEORGE, ROBERT STAFFORD and DONALD SARSFIELD

No. 97-3460

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

June 11, 1998, Argued Under Third Circuit LAR 34.1(a)
December 11, 1998, Filed

COUNSEL: David J. Millstein (ARGUED), Jacquelyn A. Knupp Millstein & Knupp. Youngwood, PA, Attorneys for Appellant.

Christopher K. McNally (ARGUED), Murphy Taylor, P.C., Pittsburgh, PA, Attorney for Appellees, Dennis George, Robert Stafford and Donald Sarsfield.

John K. Greiner (ARGUED), Belden, Belden, Persin & Johnston, Greensburg, PA, Attorney for Appellee, Albert Diehl.

JUDGES: Before: STAPLETON, COWEN, AND RENDELL, Circuit Judges.

OPINIONBY: RENDELL

OPINION: OPINION OF THE COURT

RENDELL, Circuit Judge:

On the evening of April 23, 1996, Laurie Latshaw telephoned Constable Albert Diehl and enlisted his aid in her plan to take a van from her former husband, Mark Abbott, the next day. Although Latshaw recovered the van, her plan was less than successful in that Abbott then filed an action under 42 U.S.C. § 1983 against her, Diehl, and three Greensburg, Pennsylvania, police officers who arrived on the scene to assist the constable, for violation of his Fourteenth Amendment right to procedural due process. The district court granted summary judgment and dismissed Abbott's claim against all of the defendants, determining that the law enforcement officers were entitled to qualified immunity, and that both the pleadings and the evidence failed to implicate Latshaw in any state action. Abbott appeals the district court's dismissal of his § 1983 claim against all of the defendants, as well as its denial of his motion to add a claim alleging a violation of the Fourth Amendment. We will affirm summary judgment in favor of Officer Sarsfield and Officer Stafford of the Greensburg police department on qualified immunity grounds, but will reverse dismissal of Abbott's § 1983 claim against Diehl, Lieutenant George of the Greensburg police, and Latshaw.

We will also reverse the district court's denial of leave to amend the complaint.

I. BACKGROUND

Mark Abbott and Laurie Latshaw were married from 1983 until 1993. Latshaw's father, Dale Feather, purchased a van with "GMAC" financing in 1989, and received a Commonwealth of Pennsylvania certificate of title issued in his name. On November 18, 1991, Feather and Abbott signed a Bill of Sale in which Feather agreed to"grant[ ], se!l[ ],

convey[ ] and deliver[ ]" the van to Abbott "free and clear of all liens and encumbrances . . . subject to the Purchaser paying all of the loans and encumbrances levied against" it. Thereafter, Abbott and Latshaw used the van, but its title and registration remained in Feather's name.

Abbott retained sole possession of the van after he and Latshaw were divorced in 1993. He had completely paid off the GMAC loan on February 25, 1994, but chose not to transfer the van's title and registration to his own name because by doing so he would have forfeited the van's non-transferable warranty.

On April 23, 1996, Feather assigned the van's title to his daughter by writing her name and address on the reverse side of the Certificate of Title alongside his notarized signature. The next day, Latshaw took the document to Greensburg where a title service reissued the van's registration in her name. She then telephoned Albert Diehl, a Westmoreland County constable, and informed him "that [she had] the title to the car, it is signed over to [her] and that [she] needed help in retrieving it from Mark Abbott." She expected the constable to "tell Mark that, yes, the [van] was [hers] and [she] could take it and that was it." Latshaw admits that she contacted Diehl in his capacity as a constable. She also testified that she paid him for his services. n1

On April 25, 1996, Latshaw and Diehl met outside Abbott's chiropractic office in Greensburg. Neither of them had notified Abbott of the impending seizure. As proof that she owned the van, Latshaw showed the constable the Pennsylvania certificate of title issued in her father's name and bearing a notarized assignment to her, a temporary registration issued in her name, temporary license plates, and

an insurance card indicating that the van was insured by a policy issued to James P. Latshaw, presumably her husband.

Convinced that Latshaw was entitled to immediate possession of the van, Diehl approached Abbott, identified himself as a constable, and asked him if he would give Latshaw the keys to the van. Abbott refused. He insisted that he had paid for the van, had driven it for seven years, and had a bill of sale at home establishing that he owned it. Abbott asked if he could drive the van home to get the proof of ownership, but Diehl threatened to arrest Abbott if he drove off in "her vehicle." Abbott then telephoned David Harr, the attorney who had represented him in the sale transaction with Feather. Harr told Diehl that the bill of sale existed, and warned the constable that he would be held liable if he helped Latshaw take the van.

Shortly thereafter, Diehl telephoned the Greensburg police and requested that an officer come to the scene to review Latshaw's documentation. Lieutenant Dennis George, Officer Robert Stafford, and Officer Donald Sarsfield of the Greensburg police arrived on the scene in response to the call. They reviewed Latshaw's paperwork and confirmed by radio that the van was in fact registered to Dale Feather. One of them told Latshaw she was entitled to immediate possession of the van.

David J. Millstein, Abbott's current counsel, arrived at the scene at about this time. He spoke briefly to Diehl, and then entered into a heated discussion with Lt. George in which he vehemently opposed the seizure. When words proved ineffective, Millstein took action. By then, a locksmith whom Diehl had recommended to Latshaw had cut a key to the van. Millstein boxed the van into its parking space with his car in

order to prevent Latshaw from driving it out of the parking lot. According to the police report submitted by Stafford, Lt. George then threatened to arrest Millstein if he did not make way for the van. When Millstein refused to do so, Lt. George told him that he was under arrest. The Greensburg police officers then issued him a summary citation for disorderly conduct and briefly detained him in a police car. Meanwhile, Latshaw managed to maneuver the van around Millstein's car and drove off.

Abbott commenced a 42 U.S.C. § 1983 action against Diehl, the Greensburg police officers, and Latshaw, claiming that they deprived him of property under color of state law without due process. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3), and 42 U.S.C. § 1983. Abbott now appeals from the July 21, 1997, final order of the district court granting summary judgment on qualified immunity grounds in favor of Diehl and the Greensburg police officers, dismissing his § 1983 claim against Latshaw for lack of state action, and denying him leave to amend his complaint to include an alleged violation of the Fourth Amendment.

We have jurisdiction to review the final order of the district court under 28 U.S.C. § 1291. In reviewing an order of summary judgment predicated on qualified immunity grounds, we exercise plenary review over the district court's legal conclusions. See Kornegay v. Cottingham , 120 F.3d 392, 395 (3d Cir. 1997). We will affirm summary judgment if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the non-moving party, we conclude that there is no genuine issue of material fact to be resolved at trial, and that the moving party is entitled to judgment as a matter of law. See id.

II. DISCUSSION

The district court held that although Abbott asserted a property interest upon which a § 1983 claim for violation of procedural due process may be predicated, qualified immunity shields the officers from potential liability for their role in the seizure. We agree with the finding that the officers were state actors and effected a constitutional deprivation, but part company with the district court on the issue of qualified immunity.

A. 42 U.S.C. § 1983

Section 1983 provides a cause of action for violations of federally secured statutory or constitutional rights "under color of state law." 42 U.S.C. § 1983. See West v. Atkins, 487 U.S. 42, 48, 101 L. Ed. 2d 40, 108 S. Ct. 2250 (1988). Abbott alleges in his § 1983 claim that Constable Diehl and the Greensburg police officers violated his Fourteenth Amendment right to procedural due process by using the authority vested in Pennsylvania law enforcement officers to deprive him of property without prior notice and an opportunity to be heard. If their conduct satisfies the state action requirement of the Due Process Clause, then it also qualifies as action "under color of state law" for § 1983 purposes. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 n.18, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982).

1. Constable Diehl and the Greensburg Police Officers

Where, as here, defendants have successfully raised the shield of qualified immunity in a § 1983 action, an appellant trying to reverse summary judgment bears the initial burden of

showing that the defendants violated a clearly established statutory or constitutional right. See Sherwood v. Mulvihill, 113 F.3d 396, 399 (3d Cir. 1997) (citing In re City of Phila. Litig., 49 F.3d 945, 961 (3d Cir. 1995)). In particular, Abbott must establish that the officers were acting as state actors when they deprived him of a property interest to which he had a legitimate claim of entitlement without the process he deserved.

a. State Action

State action is a threshold issue in a Fourteenth Amendment claim. "The deprivation must be caused by the exercise of some right or privilege created by the State . . . or by a person for whom the state is responsible," and "the party charged with the deprivation must be a person who may fairly be said to be a state actor." Lugar, 457 U.S. at 937. The traditional definition of action under color of state law is similar, and requires that one liable under § 1983 "have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " West, 487 U.S. at 49 (quoting United States v. Classic, 313 U.S. 299, 326, 85 L. Ed. 1368, 61 S. Ct. 1031 (1941)).

We need not dwell on whether Diehl and the Greensburg police officers were state actors. They were clearly invested with the power and authority of the state when they assisted Latshaw, and "state employment is generally sufficient to render the defendant a state actor." Lugar, 457 U.S. at 935 n.18. In Pennsylvania, constables are elected public officials with prescribed duties and liabilities, see 13 Pa. Cons. Stat. Ann. §§ 1, 41, 45 (1998), and we likewise consider police officers to be a "set of state actors." Michigan v. Jackson, 475 U.S. 625, 634, 89 L. Ed. 2d 631, 106 S. Ct. 1404 (1986).

Diehl admits that he acted as a constable, and identified himself as such to Abbott. The other officers arrived on the scene in response to Diehl's call for assistance, and were on duty. All four law enforcement officers were clearly state actors.

b. Deprivation of a Constitutional Right

It is elementary that procedural due process is implicated only where someone has claimed that there has been a taking or deprivation of a legally protected liberty or property interest. See Board of Regents v. Roth , 408 U.S. 564, 569, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). It is also well established that possessory interests in property invoke procedural due process protections. See Fuentes v. Shevin, 407 U.S. 67, 87, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972). In Fuentes, the Supreme Court struck down as unconstitutional Florida and Pennsylvania prejudgment replevin procedures used by creditors to recover household goods purchased under conditional sales contracts and on which payments were allegedly overdue. "Clearly their possessory interest in the goods, dearly bought and protected by contract, was sufficient to invoke the protection of the Due Process Clause." Id. at 86-87 (footnote omitted). n2 It is equally clear that Abbott's possessory interest in the van he had driven for seven years invoked the protection of the Due Process Clause.

At the core of procedural due process jurisprudence is the right to advance notice of significant deprivations of liberty or property and to a meaningful opportunity to be heard. See LaChance v. Erickson, 522 U.S. 262, 118 S. Ct. 753, 756, 139 L. Ed. 2d 695 (1998); Boddie v. Connecticut, 401 U.S. 371, 379, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971). Prior notice is not, however, absolutely necessary so long as other

procedures guarantee protection against erroneous or arbitrary seizures. See Mitchell v. W. T. Grant Co., 416 U.S. 600, 605-606, 40 L. Ed. 2d 406, 94 S. Ct. 1895 (1974); Finberg v. Sullivan, 634 F.2d 50, 58 (3d Cir. 1980) (en banc). In Mitchell, the Court upheld a Louisiana statute requiring creditors to obtain judicial approval, post a bond, and submit a verified petition or affidavit before they sequestered property without notice from debtors entitled to seek immediate dissolution of the writ or to regain possession of the sequestered goods by filing a bond. Comparable procedures did not protect Abbott here. The Court has also found prior notice unnecessary in rare cases where (1) a seizure was directly necessary to secure an important governmental or general public interest, (2) there was a special need for very prompt action, and (3) "the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in a particular instance." Fuentes, 407 U.S. at 91. This rare exception to the general requirement of providing notice before state action deprives an individual of a protected property interest is also inapplicable here.

Abbott has a strong claim against Diehl for violating his right to procedural due process by failing to give him advance notice and an opportunity to be heard prior to Latshaw's seizure of the van. The constable played a principal role in the seizure. Latshaw enlisted him, and paid for his help because she believed that she could not take the van from Abbott without it. According to Abbott, "Mr. Diehl walked into my office and identified himself as a constable and told me that he was [there to take my vehicle," and that "we're going [to] take the vehicle one way or another." The

constable threatened to arrest Abbott for driving "her vehicle" if he tried to drive the van home. Viewing the record in the light most favorable to Abbott, we find that a reasonable jury could conclude that Diehl used his public authority to help Latshaw take possession of the van, and as such was obligated to notify Abbott of the seizure in advance and to provide him with a meaningful opportunity to be heard.

The Greensburg police officers were called to the scene to check Latshaw's documentation, which they did. There is no evidence that two of the officers -- Sarsfield and Stafford -- did any more than this. The mere presence of police at the scene of a private repossession does not, alone, constitute state action causing a deprivation of a protected property interest. In Menchaca v. Chrysler Credit Corp., 613 F.2d 507 (5th Cir. 1980), the Fifth Circuit Court of Appeals declined to find state action on the part of police officers who arrived at the scene of a self-help repossession in response to a report regarding a disturbance, maintained the peace, but did not take sides or assist the private repossessor in any way. Id. at 511-13. Officers Sarsfield and Stafford confined their conduct to the routine police procedures of checking the vehicle registration, and cannot be said to have used state action to deprive Abbott of his due process rights. See United States v. Coleman , 628 F.2d 961, 964 (6th Cir. 1980) (acquiescence by police does not transform private acts into state action; police presence is not necessarily encouragement). However, Lieutenant George did not remain neutral, but advised Latshaw that she had a right to immediate possession of the van. Lt. George also ignored Millstein's ardent protest of the seizure, and threatened to arrest Millstein if he did not move his car to make way for Latshaw. Although he was not the instigator, a jury could find that Lt. George, by his conduct, joined forces with Diehl in

the unconstitutional deprivation, going beyond the permissible conduct outlined in Menchaca. See, e.g., Booker v. City of Atlanta, 776 F.2d 272, 274 (11th Cir. 1985) (plaintiff can withstand summary judgment if jury could find that police involvement constitutes intervention and aid). This affirmative intervention and aid constitutes a sufficient basis for a reasonable trier of fact to find that Lt. George played a role in the seizure and resulting violation of Abbott's constitutional rights. Sarsfield and Stafford are therefore entitled to dismissal of the claims against them, but Lt. George is implicated in the constitutional violation.

2. Laurie Latshaw

Although not an agent of the state, a private party who willfully participates in a joint conspiracy with state officials to deprive a person of a constitutional right acts "under color of state law" for purposes of § 1983. See Dennis v. Sparks, 449 U.S. 24, 27-28, 66 L. Ed. 2d 185, 101 S. Ct. 183 (1980); Adickes v. S. H. Kress & Co., 398 U.S. 144, 152, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970); McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ., 24 F.3d 519, 524 (3d Cir. 1994) ("State action may be found if the private party has acted with the help of or in concert with state officials."). The district court dismissed Abbott's § 1983 claim against Latshaw sua sponte because it found that his complaint failed to allege a conspiracy between Latshaw and Diehl, and that "the record revealed no basis to infer that any such allegation could withstand scrutiny." Abbott had alleged in his complaint that Diehl acted "at the instance and request of Defendant Latshaw" and that Latshaw was thus "acting under color of state law" for purposes of the lawsuit. Further, the complaint depicted joint action by Latshaw and Diehl in effectuating the recovery of the van. This is not a case in

which the complaint contains conclusory allegations of concerted action but is devoid of facts actually reflecting joint action. See, e.g., Fries v. Helsper, 146 F.3d 452, 458 (7th Cir. 1998), cert. denied, 119 S. Ct. 337, 142 L. Ed. 2d 278, 67 U.S.L.W. 3257, (U.S. Oct. 13, 1998) (No. 98-219). Rather, the complaint easily satisfied the standards of notice pleading; no more is required of a plaintiff in § 1983 cases. See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168-69, 122 L. Ed. 2d 517, 113 S. Ct. 1160 (1993). The district court's dismissal sua sponte was improper because the pleading contained sufficient allegations to withstand a motion to dismiss. Further, we find the court's conclusion that the record contained no facts which could support a conspiracy allegation to have been premature -- since no motion for summary judgment had been filed -- but also curious in light of the facts borne out by the evidence, including Latshaw's statement under oath that she contacted Diehl and that she paid him to help her take possession of the van. (See Latshaw Dep. at 14). We will therefore reverse the district court's sua sponte dismissal of Abbott's § 1983 claim against Latshaw.

B. Qualified Immunity

Qualified immunity shields public officials performing discretionary functions from § 1983 and Fourteenth Amendment liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). Our qualified immunity inquiry thus proceeds in two steps. See Sharrar v. Felsing, 128 F.3d 810, 828 (3d Cir. 1997). First, we must determine whether the defendants violated "clearly established" rights. Second, we must decide

whether, in light of the concrete, clearly established, and particular law applicable on April 25, 1996, and the information then available, a reasonable officer would have believed that the conduct of Diehl and/or the Greensburg police officers deprived Abbott of his right to procedural due process. See Anderson v. Creighton, 483 U.S. 635, 640-41, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987); Reitz v. County of Bucks, 125 F.3d 139, 147 (3d Cir. 1997).

It is readily apparent that the applicable law regarding procedural due process was "clearly established" at the time of the alleged violation of Abbott's rights. As we noted earlier, the Supreme Court's 1972 decision in Fuentes held that due process protects possessory interests in property. 407 U.S. at 87. Thus, the law in this area was clear for at least twenty-four years prior to the incident involving Abbott and the defendants.

However, resolution of the second element of the qualified immunity test is more complex. The district court determined that an objectively reasonable officer in the same situation would not have realized that the defendants were violating Abbott's rights, and ruled that Diehl and the Greensburg police officers were thus immune from § 1983 liability for helping Latshaw. The court held that an officer who had reviewed Latshaw's documentation would reasonably have concluded that she was entitled to immediate possession of the van. Therefore, it found, Diehl and the Greensburg police officers could not have believed they were denying Abbott due process of law. We disagree.

The district court and the defendants rely heavily on the fact that under Pennsylvania law certificates of title represent "prima facie evidence of the facts appearing on the

certificate." 75 Pa. Cons. Stat. Ann. § 1106(c) (1998). However, the district court and the parties have overstated the importance of Latshaw's documentation, while ignoring the established precedent of Fuentes as well as the overall context of the seizure.

At the heart of Fuentes is the principle that it is not for law enforcement officers to decide who is entitled to possession of property. Rather, it is the domain of the courts, and citizens are to have a meaningful opportunity to be heard as to their rights before they are finally deprived of possession of property. Diehl's curbside courtroom, in which he decided who was entitled to possession, is precisely the situation and deprivation of rights to be avoided. Diehl knew that Abbott had once been married to Latshaw and had been driving the van for seven years. Moreover, he had reason to believe -- based on the statements of Abbott, Harr, and Millstein -- that Abbott had a bill of sale at home to support his ownership of the vehicle. In his single-minded reliance on Latshaw's documentation, Diehl rode roughshod over Fuentes and ignored the broader context of the seizure which militated against the legality and reasonableness of his hasty conclusion that Latshaw, not Abbott, was entitled to immediate possession of the van. An official familiar with the facts then known and the law then applicable would have reasonably believed that his conduct was violating clearly established law. As such, we conclude that the district court erred when it granted summary judgment in favor of Diehl on qualified immunity grounds.

We also conclude that an objectively reasonable officer would have realized the illegality of Lt. George's conduct. Reasonable police officers should know from the established precedent of Fuentes that their role is not to be participants in

property deprivations without notice and an opportunity to be heard. There came a point during this incident when Lt. George's role changed from the protector of the peace to the enforcer. The Greensburg Police Department Supplemental Report indicates that Lt. George told Millstein that he would be arrested if he did not move his van, and states that, when Millstein refused to cooperate, Lt. George "grabbed" him by the arm and "told [him] that he was under arrest." (App. at 541). In light of Fuentes, we believe that a reasonable officer in Lt. George's position would have known that such behavior crossed the line of permissible conduct. We will thus reverse summary judgment on qualified immunity grounds as to Lt. George as well.

III. MOTION FOR LEAVE TO AMEND THE COMPLAINT

The district court denied Abbott leave to amend his complaint to include an alleged Fourth Amendment violation based on its findings that the defendants did not "seize" Abbott's van, and that a Fourth Amendment claim "would be futile in light of the defendant officers' right to qualified immunity under the circumstances." We review the district court's denial of leave to amend a complaint for abuse of discretion. See Lewis v. Curtis, 671 F.2d 779, 783 (3d Cir. 1982). However, we also recognize that "if a district court concludes that an amendment is futile based upon its erroneous view of the law, it abuses its discretion." R.M. Smith v. National Collegiate Athletic Ass'n, 139 F.3d 180, 190 (3d Cir. 1998). Here, we find fault with both of the district court's rationales, and we conclude that the court abused its discretion in denying Abbott leave to amend.

First, in light of the Supreme Court's expansive view of the concept of "seizure" under the Fourth Amendment, as set forth in Soldal v. Cook County, Ill., 506 U.S. 56, 61-65, 121 L. Ed. 2d 450, 113 S. Ct. 538 (1992) (a Fourth Amendment "seizure" of property "occurs when 'there is some meaningful interference with an individual's possessory interests in that property,' " (citation omitted)), it is possible that plaintiff could in fact state a constitutional claim. Further, the district court's ruling as to qualified immunity, based as it is on the immunity issue relating to a due process violation, is not well-founded. The court opined that because qualified immunity applied to Abbott's due process claim, it necessarily would apply to his Fourth Amendment claim as well. n3 Yet whether the defendants are entitled to qualified immunity from a claim under the Fourteenth Amendment is a wholly different inquiry from whether the defendants are entitled to qualified immunity from a Fourth Amendment claim involving the seizure of personal property. The latter inquiry involves whether, in light of clearly established Fourth Amendment law applicable on April 25, 1996, a reasonable officer in the position of Diehl and Lt. George would have believed that their conduct violated Abbott's Fourth Amendment rights. This issue has not even been raised, let alone analyzed. Leave to amend the complaint should have been granted.

IV. CONCLUSION

For the foregoing reasons, we will affirm the district court's order of summary judgment in favor of Officers Sarsfield and Stafford, but will reverse the grant of summary judgment as to Constable Diehl and Lt. George. We will also reverse the district court's dismissal of Abbott's § 1983 claim against Latshaw, and its denial of leave to amend the complaint, and

we will remand to the district court for further proceedings consistent with this opinion.

Footnotes

n1 The transcript of Latshaw's deposition reads as follows:
Q. Now, when you contacted Al Diehl, you were cont acting him as a constable; is that correct?

A. Yes, I was.

Q. And did you pay him for his services?

A. Yes, I did.

Q. How much did you pay him?

A. $ 40.

(Latshaw Dep. at 13-14).

n2 The defendants argue that Abbott had no property interest in the van because he did not list it among his assets in a prior bankruptcy proceeding, and is therefore judicially estopped from claiming he owns it. They also contend that his ownership of the van was uncertain because it was not explicitly awarded to him in the divorce proceedings. Because deprivation of a possessory interest alone invokes the right to procedural due process, we need not consider these arguments as to who owned the van.

n3 The district court made this determination without the benefit of any briefing by the parties. In opposing Abbott's

motion for leave to amend, none of the defendants had argued that the amendment was futile because of the availability of a qualified immunity defense.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 96-803

MARK ABBOTT,

Plaintiff,

v.

LAURIE J. LATSHAW,ALBERT
DIEHL, DENNIS GEORGE
ROBERT STAFFORD and
DONALD SARSFIELD

Defendants.

O P I N I ON

DIAMOND,D.J.

Plaintiff commenced this action under 42 U.S.C. Sec.1983 alleging that his rights to due process of law were infringed when defendant Laurie J. Latshaw, plaintiff's ex-wife, appeared at plaintiff's business, and with the assistance of Albert Diehl (a Westmoreland County constable) and Dennis George, Robert Stafford and Donald Sarsfield (police officers for the City of Greensburg, Pennsylvania) removed from plaintiff's possession a 1989 Plymouth Grand Voyager valued at $8,000.00.

Presently before the court are defendants Diehl,George, Stafford and Sarsfield's ("defendant officers") motions for summary judgment based upon, inter alia, qualified immunity.

For the reasons set forth below, the motions will be granted.

I. Background

Plaintiff is a chiropractor who resides and has his principal place of business in the city of Greensburg, Pennsylvania. Plaintiff was married to the defendant Laurie J. Latshaw from 1983 until 1993. On July 11, 1988, plaintiff and Latshaw together filed for bankruptcy protection under Chapter 13 in order to reorganize their debts.

On January 13, 1989, plaintiff's father-in-law, Dale Feather ("Feather"), purchased the 1989 Plymouth Grand Voyager ("van") through "GMAC" financing. The van was titled in Feather's name pursuant to a Commonwealth of Pennsylvania Certificate of Title. Feather obtained a Pennsylvania registration and license plate for the van.

On November 18, 1991. Feather and plaintiff entered into an agreement whereby Feather conveyed ownership of the van to plaintiff, "subject to" plaintiff making all the remaining monthly payments to GMAC. After all monthly payments were made, the van's title was to be transferred to plaintiff. The van remained titled and registered in Feather's name.

In August of 1991, plaintiff filed for divorce, which was finalized in 1993.n1 On March 14, 1994, plaintiff was discharged from bankruptcy. Plaintiff did not list the van as an asset or assert a property interest in it in either the divorce or

bankruptcy proceedings. Plaintiff made the last payment on the van in or around February of 1994.

On April 23, 1996, Feather executed an assignment of title to his daughter, Latshaw. On April 24, 1996, Latshaw telephoned Diehl, informed him that she was coming to the area the following day, and asked that he assist her in gaining possession of some property that she owned? [fn 2]

On April 25, 1996, the following events occurred. Latshaw attended a hearing in Pittsburgh, Pennsylvania, concerning plaintiff's responsibility to remain current on his obligations for child support. At approximately 5:00 p.m., Latshaw and Diehl arrived bv separate vehicles at plaintiff's office in Greensburg. Latshaw presented paperwork to Diehl regarding the van and asked him to help her gain possession of it. Diehl, in turn, called the Greensburg police department. Defendants George, Stafford, and Sarsfield thereafter arrived at the scene.

Latshaw asked Diehl to go into plaintiff's office and ask if plaintiff would give the keys to the van to Latshaw, Diehl went into plaintiff's office. Upon being informed that Latshaw was claiming ownership to the van, plaintiff voiced his objections and asserted that he had a "piece of paper" which would prove that he was entitled to possession and ownership of the van. Plaintiff was unable to produce the "piece of paper" because it was not in the van or at his office. Plaintiff refused to relinquish voluntarily the keys to the van.

Latshaw asked Diehl for the name of a local locksmith. Latshaw telephoned a locksmith and plaintiff called attorney Millstein, both of whom arrived at plaintiff's office. Attorney Millstein voiced his objections to the police officers aiding

Latshaw in gaining possession of the van. He attempted to convince the officers of plaintiff's legitimate interest in the van and indicated that he was ready to call a judge or the state police in order to prevent the officers from further aiding Latshaw. Attorney Millstein then pulled his own vehicle behind the van in order to prevent it from having a clear path of exit. Attorney Millstein received a citation for disorderly conduct, After the locksmith succeeded in opening the van, Latshaw paid the locksmith for his services and drove away with the van.

II.

Generally, a cause of action under section 1983 has two elements: (1) the deprivation of a constitutional right (2) by a person acting under color of state law, 42 U.S.C. section 1983. The plaintiff has the burden to prove all essential facts necessary for recovery by a fair preponderance of the evidence.

In order to recover for an alleged procedural due process claim, the plaintiff must prove that state actors infringed a property interest encompassed by the Fourteenth Amendment. Midnight Sessions. Ltd. v. City of Philadelphia, 945 F.2d 667, 679 (3d cr. 1991,cert.den., __U.S.__, 112 s.ct. 1668, 118 L Ed. 2d) (1992). "A property interest subject to protection by the due process clause results from a "legitimate claim of entitlement? created by an independent source such as state law." Id. (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). The plaintiff also must prove that the state procedures for challenging the deprivation do not comport with due process at law. Taylor Inv., Ltd. v. Upper Darby v Township, 983 F.2d 1285, 1293 (3d Cir.), cert. denied, 510 U.S. 914 (1993).

The defendant officers advance several bases for summary judgment, including the doctrine of qualified immunity. Plaintiff contends that the officers are not entitled to qualified immunity because they failed to recognize that plaintiff was entitled to a pre-deprivation hearing and an opportunity to be heard before the van could be removed from plaintiff's possession.

The doctrine of qualified immunity shields state actors from liability if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The inquiry is based upon "the objective reasonableness of an official's conduct, as measured by reference to clearly established law . . . " Id. The determination of whether a law was "clearly established" encompasses consideration of whether "[t]he contours of the right ... [are] sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right." Anderson v Creighton, 483 U.S. 635, 640 (1987) . The action in question previously need not have been held unlawful; instead, in "the light of pre-existing law the unlawfulness must be apparent." Id.

The assessment of whether an official's conduct violated a clearly established right is not to be based upon the generalities associated with a broad constitutional provision. Id. at 639. The question is whether, in light of the clearly established law and the specific circumstances confronting the state actor, a reasonable person would have believed the action undertaken to be lawful. Id. at 641. The subjective belief of the state actor is irrelevant. Id.

"Where a defendant asserts a qualified immunity defense in a motion for summary judgment, the plaintiff bears the initial

burden of showing that the defendant's conduct violated some clearly established statutory or constitutional right." Sherwood v Mulvihill, 113 F.3d 396. 399 (3d Cir. 1997) citing In re City of Philadelphia Litigation 49 F.3d 945, 961 (3d Cir. 1995)). Once plaintiff has carried the burden of demonstrating a clearly established right. the defendant must, to succeed on summary judgment, show that "no genuine issue of material fact remains as to the "objective reasonableness" of the defendant's belief in the lawfulness of his actions." Sherwood, 113 *F.3d* at 399 (citing Albright v. Rodriguez. 51 F.3d. 1531, 1535 (10th Cir. 1995)

III.

Plaintiff's instant burden is to show that a clearly established right was violated. Plaintiff asserts that even without a title, his possessory interest in the van was sufficient to invoke the protection of the due process clause. Plaintiff cites Fuentes v. Shevin, 407 U.S. 67 (1972) , where individuals had purchased goods pursuant to a conditional sales contract. The seller was to retain title to the goods until all payments had been made. When the purchasers defaulted, the seller repossessed the goods under the authority of a state's replevin statute. The plaintiff challenged the constitutionality of the replevin statute, which did not provide for a pre-deprivation hearing. The Court held that even though the seller held title to the goods, the buyer's possessory interest was "sufficient to invoke the protection of the due process clause," Id at 87.

Under Fuentes, plaintiff's possessory interest in the van was sufficient to assert a right to the protection afforded by the due process clause, Plaintiff and his wife had joint possession of the van for a number of years and, following their divorce, plaintiff had sole possession. He made all payments on the

van and was in control of it at the time defendants arrived at his office. Thus, plaintiff has asserted a property interest upon which a Sec. 1983 claim can be predicated.

Demonstrating that a clearly established right generally was implicated in the context of what occurred is insufficient to defeat a claim for qualified immunity, Anderson 483 U.S. at 639 Because it is the specific actions of the official that are at issue, the determination of whether an official is entitled to qualified immunity is fact-specific. Brown v. Grabowski, 922 F.2d 1097. 1111 (3d Cir. 1990) In this regard the court is required to assess "the facts adduced concerning the conduct of the official who claims immunity" and determines whether a reasonable person would understand in that context that the action taken would violate the clearly established right.? Id., see also Grant v. City of Pittsburgh, 98 F.3d 116, 122 (3d Cir. 1996) . The specific circumstances confronting each state actor claiming immunity must be analyzed separately. Grant 99 F.3d at 123. In making the detailed factual assessment of each individual defendant's conduct, the record is to be viewed in the light most favorable to the non-moving party. Id. at 122.

In this case, the action complained of is allowing Latshaw to take possession of the van. In other words, the action complained of is the defendant officers' determination, at plaintiff's office, that Latshaw was entitled to possession of the van despite plaintiff protestations that he was the lawful owner of it.

Plaintiff does not dispute that Latshaw provided the defendant officers with a number of documents on April 25, 1996. She had in her possession (1) a Pennsylvania certificate of title issued in the name of Dale Feather, which contained on the back of it a notarized assignment of title to Latshaw,, (2)

an executed temporary registration, (3) temporary license plates and (4) an insurance card indicating that the van was insured under policy issued to James P. Latshaw. The assignment on the back of the certificate of title had a notarized seal by an Illinois notary public. The temporary registration appeared to have been signed by a certified agent of the Commonwealth.

Latshaw originally presented this paperwork to constable Diehl and asked for his assistance in gaining possession of the van. Diehl summoned the Greensburg police for assistance. After the officers arrived, Diehl presented Latshaw's papers to Officer Stafford Officer Stafford thereafter verified by radio that the registration of the van with the Pennsylvania Department of Transportation was in the name of Dale Feather. The paperwork in Latshaw's possession appeared to be complete and authentic. It was notarized and/or contained the appropriate signatures in all appropriate places. Diehl made copies of Latshaw's documents before Latshaw removed the van from plaintiff's parking lot.

The Pennsylvania Vehicle Code, Title 75 of Pa.Cons.Stat,Ann.. contains provisions setting forth the purpose and function of documents relating to ownership and registration of motor vehicles. Section 1106(c) provides that "[a] certificate of title issued by the department is prima facie "evidence of the facts appearing on the certificate." Defendant Latshaw produced a certificate of title on the van to the other defendants. *The* appropriate section on the *back* of the certificate indicated that Dale Feather whose name appeared on the title, had executed a notarized assignment of title to Latshaw in accordance with 75 Pa,Cons.Stat,Ann. Sec. 1111(a). [fn 3] The Supreme Court of Pennsylvania has held that "[t]he purpose of a certificate of title is not to

conclusively establish ownership in a motor vehicle, but rather to establish the person entitled to possession." Speck Cadillac-Olds v. Goodman, 95 A2d. 191, 193 (Pa. 1953) "This purpose is served whether the title certificate is permanent or temporary." Id. Latshaw produced a certificate of title that appeared to be lawfully assigned to her.

In addition, Latshaw produced a temporary registration (temporary title certificate) and a temporary license plate in her name. The Vehicle Code provides that "no vehicle shall be registered unless a certificate of title has been applied for or issued." 75 Pa.Cons.Stat.Ann. Sec.1301(c). This registration document, coupled with the fact that the department was no to register the vehicle without a title, was further evidence to the defendants that Latshaw had become the owner of the van according to the Commonwealth's system of ownership and was entitled to lawful possession of the van. Finally, Latshaw also produced a temporary insurance certificate covering the van with her husband's name appearing as the insured.

In accordance with Speck, Latshaw's documents and temporary plate provided sufficient prima facie evidence of Latshaw's right to lawful possession. While the documents and plates did not conclusively establish ownership, they were sufficient to serve as prima facie evidence of what appeared on them. See 75 Pa.Cons.Stat.Ann. Sec. 1106(c). The officers' reliance on these documents cannot be shown, as a matter of law, to be objectively unreasonable with regard to who was entitled to immediate possession of the van and the right to operate it on the highways of the Commonwealth. See also S.E. First National Bank of Miami v. Security Peoples Trust Co., 480 F.Supp. 1345, 1247 (W.D.Pa. 1979) (Although a certificate of title is only indicia of ownership, it does establish "the name of the person with the right of possession

under the law.") ; In re Estate of Summers, 226 A.2d 197, 199 (Pa. 1967) ("A certificate of title is not conclusive evidence of ownership but rather establishes the person entitled to possession.") (emphasis in original)

The final issue is whether each individual defendant is immunized by the production of these documents. Defendant Diehl first reviewed the papers proffered latshaws. After he telephoned the Greensburg Police Department, the three defendant police officers arrived and Officer Stafford verified that the certificate of title was registered in Feather's name. Because the documents proffered by Latshaw provided sufficient prima facie evidence of ownership and the right to possession of the van under Pennsylvania's Vehicle Code as a matter of law, a reasonable person would not have believed that permitting Latshaw to take possession of the van would violate clearly established statutory or constitutional rights. It follows that defendants Diehl, George, Stafford and Sarsfield are immunized by the doctrine of qualified immunity.

After defendants filed their motions for summary judgment, plaintiff moved to amend his complaint to include a claim for violation of his Fourth Amendment rights, contending that the officer defendants' conduct violated plaintiff's right to be free from unreasonable seizures. This theory of recovery is inapposite. The defendant officers did not seize plaintiff's property based upon some conduct undertaken by plaintiff; they merely permitted the presumptive owner of the property to take possession of it without incident. Furthermore, permitting leave to amend would be futile in light of the defendant officers' right to qualified immunity under the circumstances.

A Sec. 1983 claim may only be brought against a private party where there is a conspiratorial agreement to deprive an individual of constitutional rights under color of state law. Parkway Garage, inc. v City of Philadelphia, 5 F.3d 695, 7000 (3d Cir. 1993) . Where a private party engages in concerted activity with state officials aimed at depriving another of a constitutional right, the conspiratorial arrangement with the state actor "clothes the private party with the `under color of state law' vestment." Melo v. Hafer. 912 F.2d 628, 638 (3d Cir. 1990) cert. denied, 498 U.S. 1118 (1991)

Plaintiff's complaint contains no conspiratorial allegations. The court's independent review of the record before it reveals no basis which would support a recovery against Latshaw on this theory. In fact, the defendant officers" entitlement to qualified immunity is grounded upon the independent actions undertaken by Latshaw in procuring the appropriate paperwork which vested a right to possession of the van in Latshaw. Latshaw has proceeded pro se in this matter and has not filed a dispositive motion. Nevertheless, the complaint being devoid of the critical allegations necessary to clothe Latshaw with the color of state law element and the record revealing no basis to infer that any such allegation could withstand scrutiny, the court will dismiss the complaint as against Latshaw sua sponte.

It must be emphasized that the determination of which party (Abbott or Latshaw) is entitled to ultimate ownership of the van is beyond the scope of the issues raised. That determination is one that must be made by the courts of the Commonwealth of Pennsylvania. The determination made herein is only that, on the day of the incident in question, the information on which the constable and police officers relied was sufficient to warrant an objective belief that Latshaw was

entitled to lawful possession of the van. Under the circumstances as presented a reasonable officer would not believe that permitting Latshaw to remove the van from plaintiff's place of business was violation of clearly established rights. Accordingly, the officer defendants' motions for summary judgment will be granted and the court will dismiss the complaint against Latshaw sua sponte without prejudice to any state law claims plaintiff may have against Latshaw and Feather.

An appropriate order will follow

Footnotes

1. Latshaw sought and obtained a protection from abuse order against plaintiff during the divorce proceedings.

2. Latshaw explained in her deposition that she requested Diehl's assistance out of a concern to avoid "any violence" and to leave "without any problem."

3. This section provides:

In the event of the sale or transfer of the ownership of a vehicle within this Commonwealth, the owner shall execute an assignment and warranty of title to the transferee in the space provided on the certificate or as the department prescribes, sworn to before a notary public or other officer empowered to administer oaths, and deliver the certificate to the transferee at the time of the delivery of the vehicle.

75 Pa.Cons.Stat.Ann, Sec. 1111(a).

Sec. 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Sec. 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections (c) and (d) and 1295 of this title.

Sec. 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Sec. 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section -

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

75 Pa.C.S. § 1106 (1998)

PENNSYLVANIA STATUTES
*** THIS DOCUMENT IS CURRENT THROUGH THE 1998 SUPPLEMENT (1997 SESSIONS) ***

TITLE 75. VEHICLES
PENNSYLVANIA CONSOLIDATED STATUTES
PART II. TITLE, REGISTRATION AND LICENSING

CHAPTER 11. CERTIFICATE OF TITLE AND SECURITY INTERESTS

SUBCHAPTER A. CERTIFICATE OF TITLE

75 Pa.C.S. § 1106 (1998)
[Pa.C.S.] § 1106. Content and effect of certificate of title

(A) VEHICLE IDENTIFICATION AND ENCUMBRANCES.-- A certificate of title shall contain such description and other evidence of identification of the vehicle for which it is issued as the department may deem necessary and the odometer reading, together with a statement of any liens or encumbrances including the names and addresses of the holder or holders of the liens or encumbrances.

(B) INDICATION OF SPECIAL PRIOR USE.-- No person shall assign a certificate of title to any vehicle having seating capacity for nine or less occupants which has been used as a taxicab, for the carrying of passengers for hire or as a police car, unless the certificate clearly contains notice that the vehicle has been so used. Indication of such use shall be deemed part of the description of the vehicle. Any person violating this subsection is guilty of a summary offense and shall, upon conviction, be sentenced to pay a fine of $ 50.

(C) CERTIFICATE AS EVIDENCE AND NOTICE.-- A certificate of title issued by the department is prima facie evidence of the facts appearing on the certificate. The certificate shall be adequate notice to the Commonwealth, creditors, subsequent lienholders and purchasers that a lien against the vehicle exists. The printed name of the secretary shall constitute a signature on the certificate.

75 Pa.C.S. § 1111 (1998)

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CHAPTER 11. CERTIFICATE OF TITLE AND SECURITY INTERESTS
SUBCHAPTER A. CERTIFICATE OF TITLE

75 Pa.C.S. § 1111 (1998)
[Pa.C.S.] § 1111. Transfer of ownership of vehicle

(A) DUTY OF TRANSFEROR.-- In the event of the sale or transfer of the ownership of a vehicle within this Commonwealth, the owner shall execute an assignment and warranty of title to the transferee in the space provided on the certificate or as the department prescribes, sworn to before a notary public or other officer empowered to administer oaths, and deliver the certificate to the transferee at the time of the delivery of the vehicle.

(A.1) EXCEPTION FOR DEALERS.-- When a certificate of title for a vehicle acquired by a licensed dealer for the purpose of resale is encumbered by a lien, delivery of the certificate of title by the dealer as a transferor at the time of delivery of the vehicle upon resale shall not be required for a vehicle being titled in this Commonwealth if, prior to delivery of the vehicle, the dealer obtains the applicable powers of attorney to properly execute transfer of the title and the dealer

requests and receives the departmental verification of any lienholders, ownership, odometer information, title brands and any other information that the department deems necessary to be verified. Upon payment of the established fee, the department shall provide the dealer or authorized messenger service with verification of the required information. The department may supply the verified information by either written or electronic means. The application and a properly assigned certificate of title shall be delivered to the department within the time period prescribed by section 1103.1 (relating to application for certificate of title). If a dealer sells a vehicle after verification of the required information for a certificate of title encumbered by a lien, but fails to satisfy the lien or deliver an assignment and warranty of title to the dealer's transferee within 90 days of the date of purchase, and this failure is the result of an act or omission by the dealer, the dealer shall accept return of the vehicle from the transferee and shall refund the purchase price less actual depreciation of the vehicle while it was within the possession of the transferee. In refunding the purchase price, the price shall include the listed dollar value of any trade-in-vehicle as stated in the sales transaction document in lieu of returning the transferee's trade-in vehicle.

(B) DUTY OF TRANSFEREE.-- Except as otherwise provided in section 1113 (relating to transfer to or from manufacturer or dealer), the transferee shall, within ten days of the assignment or reassignment of the certificate of title, apply for a new title by presenting to the department the properly completed certificate of title, sworn to before a notary public or other officer empowered to administer oaths, and accompanied by such forms as the department may require.

(C) PENALTY.-- Any person violating subsection (a) shall

be guilty of a summary offense and shall, upon conviction, be sentenced:

(1) For a first offense, to pay a fine of $ 100.

(2) For a subsequent offense, to pay a fine of not less than $ 300 nor more than $ 1,000.

75 Pa.C.S. § 1301 (1998)

PENNSYLVANIA STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH THE 1998 SUPPLEMENT (1997 SESSIONS) ***

TITLE 75. VEHICLES
PENNSYLVANIA CONSOLIDATED STATUTES
PART II. TITLE, REGISTRATION AND LICENSING
CHAPTER 13. REGISTRATION OF VEHICLES
SUBCHAPTER A. GENERAL PROVISIONS

75 Pa.C.S. § 1301 (1998)
[Pa.C.S.] § 1301. Registration and certificate of title required

(A) DRIVING UNREGISTERED VEHICLE PROHIBITED.-- No person shall drive or move and no owner shall knowingly permit to be driven or moved upon any highway any vehicle which is not registered in this Commonwealth unless the vehicle is exempt from registration.

(B) PROOF OF RESIDENCY.-- A person charged under this section has the burden of proving that he is a nonresident whenever he asserts a defense based on section 1303 (relating to vehicles of nonresidents exempt from registration). If he produces at the office of the issuing authority satisfactory

proof that he is a nonresident and is in compliance with section 1303 within five days after being charged with a violation of this section, the issuing authority shall dismiss the charge.

(C) CERTIFICATE OF TITLE PREREQUISITE TO REGISTRATION.-- No vehicle shall be registered unless a certificate of title has been applied for or issued if one is required by Chapter 11 (relating to certificate of title and security interests).

(D) PENALTY.-- Any person violating the provisions of subsection (a) is guilty of a summary offense and shall, upon conviction, be sentenced to pay a fine of $ 75 or double the registration fee, whichever is greater, except when the vehicle was previously registered within 60 days of the commission of the offense whereupon the fine shall be $ 25. In the case of a motor carrier vehicle other than a trailer, the fine shall be $ 50 if the motor carrier vehicle was previously registered within 60 days of the commission of the offense or, if the registration occurs outside the 60-day period, the fine shall be double the registration fee for the maximum weight at which the vehicle could have been registered in this Commonwealth.

Supreme Court, U.S.
FILED
MAY 25 1999
CLERK

(2)

No. 98-1528

IN THE

Supreme Court of the United States

DENNIS GEORGE,

Petitioner,

v.

MARK ABBOTT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

A. Does a police officer who relies on a motor vehicle certificate of title and vehicle registration have qualified immunity if, in reliance on that certificate, he participates in taking the vehicle away from someone in lawful possession?

B. Does the Pennsylvania Motor Vehicle Registration statute satisfy the requirement of procedural due process established by this Court in *Fuentes*?

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Statute:

Pennsylvania's Act of 1923, P.L. 425, as amended, Act of June 17, 1976, P.L. 162, 75 Pa. C.S.A. § 1101 5

Respondent respectfully requests that Petitioner's Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit be denied.

COUNTERSTATEMENT OF THE CASE

While the chronology set forth in Petitioner's Statement of the Case is reasonably accurate, the Statement nonetheless contains serious misstatements of fact.

Petitioner asserts that Respondent titled the vehicle in the name of his then father-in-law, Dale Feathers, in order to defraud the Bankruptcy Court and various creditors. This assertion, taken from the deposition transcript of Laurie Latshaw, Third Circuit Appendix (TCA), page 413, simply ignores the testimony of Dr. Abbott himself (TCA, page 341) that the arrangement was set up because the Abbotts had filed for bankruptcy and thus had insufficient credit to obtain a car loan in their own name (TCA, page 348).[1] Other than the self-serving and unsubstantiated testimony of Laurie Latshaw, there is no evidence of any kind that anyone was defrauded by this arrangement.

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1. Petitioner has a habit throughout his Statement of the Case of either including statements that are not part of the record below or using one-sided, self-serving testimony and presenting it as uncontroverted fact. For instance, there is nothing in the record concerning the disposition of Attorney Millstein's disorderly conduct charge, yet Petitioner includes that information and couches it in such a manner as to reflect negatively on Respondent.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FAILS TO PRESENT ANY COMPELLING REASON TO GRANT REVIEW

A. Does A Police Officer Who Relies On A Motor Vehicle Certificate Of Title And Vehicle Registration Have Qualified Immunity If, In Reliance On That Certificate, He Participates In Taking The Vehicle Away From Someone In Lawful Possession?

The law concerning the issue of qualified immunity is well-settled. This Court has held that qualified immunity is available to state actors performing discretionary functions to shield them from liability where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citations omitted). In *Harlow*, this Court went on to state that in deciding the issue of qualified immunity on a motion for summary judgment, the judge must determine "not only the currently applicable law, but whether that law was clearly established at the time an action occurred." *Id.* at 818. The Court held that "[i]f the law was clearly established, the immunity defense should fail, since a reasonably competent public official should know the law governing his conduct." *Id.* at 818-819.

Twenty-four years prior to the date of the incident involved in this lawsuit, this Court held that an individual in lawful possession of property was entitled to procedural

due process before being deprived of his possessory interest in the property. *Fuentes v. Shevin*, 407 U.S. 67 (1972). There is no dispute that Respondent was in lawful possession of the vehicle on April 25, 1996. Based on the rational of the *Harlow* decision, since the applicable law was clearly established, Petitioner should not be afforded the protection of qualified immunity.

Petitioner argues that his reliance on the state administrative procedures concerning certificates of titles for vehicles and the vehicle registration in determining that Latshaw was entitled to immediate possession of the vehicle was objectively reasonable, and should therefore be granted qualified immunity. This argument must fail. First, this was a civil dispute. On April 25, 1996, Respondent was in lawful possession of the vehicle. It had not been reported stolen, there was no criminal activity involved in Abbott's possession of the vehicle. As such, Petitioner simply had no authority to act at all. Given that fact, Petitioner should not be permitted to now claim his actions are shielded by qualified immunity.

Compare the facts of this matter to a situation where a vehicle is stolen and recovered by the police. The police check the certificate of title and verify the vehicle's registration. The police then return the vehicle to the individual identified on the vehicle registration, who is not the person that was in lawful possession of the vehicle at the time it was stolen. In that instance, the police would be afforded qualified immunity. The difference is that in the hypothetical, the police had authority by the nature of the incident and had no duty to investigate beyond checking the vehicle registration to determine to person entitled to possession. But in the case at hand, not only did the

Petitioner have no authority to act, he was also confronted with conflicting information regarding the ownership status of the vehicle by several people. At that point, with conflicting information being presented, Petitioner decided that Latshaw was entitled to immediate possession of the vehicle. That is precisely the situation that *Fuentes* was intended to eliminate by holding that the party in possession is entitled to procedural due process before being deprived of possession.

Second, as is more fully discussed in Respondent's next issue, the Pennsylvania Motor Vehicle Registration statute does not satisfy the requirements of procedural due process. The clearly established law of *Fuentes* mandates that someone in lawful possession of property must be afforded procedural due process before being deprived of that interest in property. Mere reliance on a state vehicle registration statute cannot overcome the fact that for 24 years the law has required procedural due process in this type of situation. The Third Circuit correctly held that Petitioner overstates the importance of the documentation provided by Latshaw on April 25, 1996 because no matter what documentation she provided, Abbott was in lawful possession and *Fuentes* controls. Petitioner seems to imply that this Court's ruling in *Fuentes* is somehow superseded by the Pennsylvania Motor Vehicle Registration statute. That is simply not true.

B. Does The Pennsylvania Motor Vehicle Registration Statute Satisfy The Requirement Of Procedural Due Process Established By This Court In *Fuentes*?

In seeking certiorari from this Court, Petitioner apparently believes that this case presents an important question of federal law that should be decided by this court.

Although not stating it directly, Petitioner apparently believes that due process requirement of *Fuentes* is achieved by Pennsylvania's Act of 1923, P.L. 425, as amended,[2] regarding the registration of automobile titles, and that this title registration statute meets the definition of due process delineated by the *Mathews*[3] case.

Adapting this argument to the specific facts of this case, Petitioner asserts that his reliance on the certificate of title presented by Latshaw at the scene of the dispute, following as it did on the heels of the fraudulent registration of the automobile title by Latshaw pursuant to the provisions of the Pennsylvania statute, is nonetheless all the due process Respondent is entitled to before he is deprived of his lawful possessory interest in the vehicle.

Even a cursory reading of *Mathews* reveals that whatever procedure is used to satisfy the requirements of due process it must include some form of notice and hearing prior to deprivation of a protected property interest. For instance, in *Mathews*, there was in place a Social Security administrative procedure which could have been utilized prior to the termination of Appellant's social security payments. Appellant chose to ignore that procedure and proceeded directly to file a suit in Federal court claiming he was denied a full scale evidentiary hearing prior to the loss of his benefits.

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2. The statute relied upon by Petitioner has been long since replaced by the Act of June 17, 1976, P.L. 162, 75 Pa. C.S.A. § 1101.

3. *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 18, 96 S. Ct. 893 (1976).

Writing for the majority, Justice Powell said as follows:

> The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision making in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss (be given) notice of the case against him and the opportunity to meet it."

424 U.S. at 348 (citations omitted).

In order then for the Pennsylvania statute regarding the registration of motor vehicle titles to comply with the dictates of *Mathews*, there would have to be in place some notice and hearing provision affording Respondent some means to challenge the registration of the title in the name of his ex-wife, Laurie Latshaw. There is none.

Petitioner argues that Respondent had the chance to register title in his own name and because he had that chance and chose not to do it, he now cannot be heard to complain of the ensuing problems.[4]

Petitioner's argument in this regard is faulty. In addition to being a complete mischaracterization of the true facts, it completely ducks the primary issue regarding notice and

4. At this point in his argument (Petition, Page 19) Petitioner again asserts that Respondent's decision to place the title in the name of Dale Feathers, his then father-in-law, was an attempt to defraud creditors. Again Respondent points out that Petitioner fails to establish that anyone was defrauded. As Respondent had testified, it was done solely to obtain the financing credit that he and his wife could not obtain because they had filed for bankruptcy.

hearing. The vehicle had been titled in the name of Dale Feathers. Respondent held a bill of sale for the purchase of the vehicle. Dale Feathers, instead of transferring title to Respondent when the loan was paid off, transferred title to his daughter.

The title registration statute has no notice provision in it. Respondent had no notice that the vehicle title was transferred to his ex-wife. The title registration statute has no hearing provisions. Even if Respondent had notice that title was now in the name of his ex-wife, there was no hearing procedure available for him to challenge it. In the total absence of any provisions for notice and hearing prior to the loss of a possessory interest, by what means can it be asserted that Respondent received procedural due process? The answer to that is simple. No means exist.

It further begs the question of Petitioner's role in the decision making process. Even if by some means the Pennsylvania statute could be construed as affording Respondent due process, it is still not the Petitioner's job, as a policeman, to intrude into what is clearly a civil dispute. Petitioner should have left this essentially civil matter to the judicial system for resolution.[5] That is the teaching of

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5. As the Third Circuit noted in its opinion, exigent circumstances sometimes permit deviation from normal due process expectations, such as if there is a special need for very prompt action. Such special need may possibly include the imminent removal of goods from the jurisdiction of the state. Interestingly enough, inasmuch as all participants knew Laurie Latshaw intended to at once remove the vehicle from Pennsylvania and drive it back to her residence in Ohio, it would seem more probable that Petitioner could have more appropriately intervened on behalf of Respondent to prevent such removal.

Fuentes, *supra*, and it was based primarily upon that ruling that the Third Circuit decided this case the way it did.

As the Third Circuit in its opinion noted,

> At the heart of Fuentes is the principle that it is not for law enforcement officers to decide who is entitled to possession of property. Rather, it is the domain of the courts, and citizens are to have a meaningful opportunity to be heard as to their rights before they are finally deprived of possession of property.

164 F.3d at 148.

Petitioner is free to draw whatever conclusion he wishes regarding the right to possession. He is free to conclude that by virtue of the documentation possessed by Laurie Latshaw she is entitled to immediate possession of the vehicle. He is free to conclude that Respondent has no right to possession of the vehicle. However, he is not free to act on those beliefs. In the absence of appropriate exigent circumstances, he is not free to be judge and jury. To hold otherwise would make *Fuentes* meaningless.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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